No. 2169

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH JUDICIAL CIRCUIT

JAMES BOLAND,

Plaintiff in Error,

vs.

GREAT NORTHERN RAILWAY COMPANY,
(a corporation),

Defendant in Error.

TRANSCRIPT OF RECORD

Upon Writ of Error to the United States District Court for the Western District of Washington, Southern Division

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The Bell Press, Printers.

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Names and Addresses of Attorneys

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King St. Passenger Station, Seattle, Washington,
Attorneys for Defendant in Error.

In the District Court of the United States for the Western District of Washington, Western Division.

JAMES BOLAND,
Plaintiff in Error,
vs.
GREAT NORTHERN RAILWAY COMPANY, a Corporation,
Defendant in Error.

Stipulation and Praecipe for Transcript

IT IS STIPULATED between plaintiff and defendant in error that the transcript of the record shall include only the following papers, to-wit:

1. Complaint.
2. Amended Answer.
3. Reply.
4. Verdict.
5. Judgment.
6. Motion for a new trial.
7. Order overruling motion for new trial.
8. Bill of exceptions and order settling same, and instructions of the Court.
9. Assignments of Error.
10. Bond on Writ of Error.

It is further stipulated that none of the exhibits need be copied or sent forward to the Circuit Court of Appeals.

It is further stipulated that the Clerk in printing the record may omit from the various papers copied, as above agreed on, the heading and title of the cause,

other than the description of the particular paper, also omit all endorsements on said papers of filing marks, service returns, verifications and receipts.

HEBER McHUGH,
JOHN T. CASEY,
Attorneys for Plaintiff in Error.
F. V. BROWN & F. G. DORETY,
Attorneys for Defendant in Error.

Complaint

The plaintiff, above named, by his attorneys, the subscribers, for his cause of action, alleges, states and avers:

I.

That plaintiff is a minor over the age of fourteen years of age, and that John M. Boyle was, on the 25th day of October, 1910, duly appointed his guardian ad litem, and that said guardian duly accepted said appointment.

II.

That the said defendant is a corporation, organized under the laws of the state of Minnesota, and was, at the times hereinafter mentioned, operating a railway from the city of St. Paul, Minn., to the city of Tacoma, Washington.

III.

That on or about the 7th day of August, 1909, this plaintiff was working for the defendant as a common laborer on its section, near mile post 12, between Seattle and Everett. That at said time he was a strong, healthy young man, with good eyesight. That he, to the knowledge of defendant, was inexpe-

rienced in the use of tools for the cutting of steel rails, and in the cutting of steel rails by the use of iron and steel tools.

IV.

That in the prosecution of his work as a sectionman as aforesaid, it became necessary and was a part of the duties of this plaintiff to use what is commonly called and designated as a cold chisel, being a tool similar to an ordinary chisel, the head of which is composed of soft iron or steel from which the temper and hardness are drawn so as to receive heavy blows from the hard hit of a hammer without causing pieces or portions of said tools to break, scale, chip or fly when struck together as aforesaid; that said cold chisel in use is held in one hand by the workman with its bit or hard end against the piece of iron or steel to be cut, while with a hammer or slight sledge the workman strikes upon the soft head of said tool for the purpose of cutting the object at which he is working. That said cold chisel and other tools used by plaintiff and other servants of the defendant similarly situated and employed are furnished and kept in repair by said defendant, and were so at the time before named.

V.

That it became and was the duty of the said defendant to furnish plaintiff and its other servants similarly employed with safe and suitable tools, and with safe and suitable cold chisels to be used in the usual and ordinary manner with the head thereof composed of metal of such softness and *elasticity* and

from which the temper and hardness had been removed that when struck with a hammer as aforesaid pieces of metal would not break, scale, chip or fly from either of said tools so as to endanger plaintiff and other servants of defendant, and to keep said cold chisels in good condition and repair and safe for use as aforesaid.

VI.

That the said defendant, disregarding its said duty, did at the time of committing the grievance hereinafter set forth, wrongfully and negligently furnish said plaintiff with an unsafe and unsuitable cold chisel, which was not of the proper softness, elasticity and temper to prevent the breaking, scaling, chipping and flying of the metal thereof when struck as aforesaid, but which cold chisel was of a hard and brittle metal wholly unfit and unsafe and not in good condition to be used for the purpose for which it was intended and for which it was furnished to plaintiff.

VII.

That on the 7th day of August, 1909, while plaintiff was so employed as a section man by defendant as aforesaid on its section, and while performing his labors in the usual and customary manner, it became and was necessary and proper for said plaintiff to use said cold chisel so negligently furnished him by said defendant, and that said plaintiff, while he held said cold chisel against a piece of a steel rail in the usual and ordinary manner, for the purpose of cutting off a piece of said rail, did then and there strike upon the head of said cold chisel with his hammer as he

was required to do in the performance of his said labors, and that by reason of said cold chisel so furnished by defendant being unfit and unsafe for the purpose for which it was furnished to plaintiff and to which it was applied by him as aforesaid in that the metal thereof was not of the proper elasticity, softness and temper as aforesaid, a piece or portion of said cold chisel broke, chipped and scaled from the head thereof when struck by plaintiff as aforesaid, and flew with great force and violence, striking plaintiff's right eye and penetrating the ball thereof, all without the fault or negligence of plaintiff while in the performance of his labors in the usual and proper manner and while he was in the exercise of due care and caution.

VIII.

That by reason of the injury aforesaid, plaintiff has become totally blind in his right eye and has suffered great pain and mental distress, and was forced to have the ball of said eye removed, and was and in the future will be obliged to undergo surgical and medical treatment. And that plaintiff by reason of said injury has been and in the future will be hindered and prevented from performing his usual labors and his earning capacity has been permanently impaired; whereby he has lost great gains and profits which otherwise would have accrued to him and will continue to lose such gains and profits during the remainder of his life.

That he will in the future be compelled to expend large sums of money for treatment and medical and

surgical care by reason of said injury. And the plaintiff further avers that by reason of the said injury and of the said negligent acts of the defendant he has been permanently injured in the loss of his right eye, and will suffer in the future great bodily pain and great inconvenience and annoyance in that his sight will be permanently impaired, his face disfigured and he will be compelled to endure the pain resulting from said injury, and that said injury will ultimately necessitate the impairment of the sight of the other eye as well. All to the plaintiff's damage Fifteen Thousand Dollars.

Wherefore plaintiff demands judgment against the defendant for the sum of Fifteen Thousand Dollars, and for his costs and disbursements.

(Filed Nov. 5, 1910.)

HEBER McHUGH,
JOHN T. CASEY,
Attorneys for Plaintiff.

Amended and Answer

Now comes the defendant and answers the complaint of the plaintiff herein as follows:

I.

Defendant has no knowledge or information as to the matters alleged in paragraph one of said complaint and so denies said paragraph and each and every allegation therein contained.

II.

Defendant admits paragraph two of said complaint.

III.

Answering paragraph three of said complaint, defendant denies that plaintiff was inexperienced in the use of tools for the cutting of steel rails, or in the cutting of steel rails by the use of iron or steel chisels or otherwise. Defendant has no knowledge or information as to plaintiff's strength or eyesight, and on said ground denies the allegations thereof in said paragraph.

IV.

Answering paragraphs four and five of said complaint, defendant admits that plaintiff was using a cold chisel and hammer, and that said chisel was used by holding it and striking it with a hammer, and that defendant furnished such hammer. Defendant denies said paragraphs four and five and each and every allegation therein contained, not herein specifically admitted.

V.

Defendant denies paragraph six of said complaint and each and every allegation therein contained.

VI.

Answering paragraph seven of said complaint, defendant denies that it was necessary or proper for plaintiff to use any cold chisel furnished by defendant negligently or any cold chisel not in proper condition to be used, or any chisel whatever; denies that a piece or portion of said cold chisel broke, chipped or scaled from the head thereof, or that it flew with great force and violence or at all, or that it struck plaintiff in the right eye or otherwise, or that it pen-

etrated the ball thereof, and denies that any injury plaintiff received was without the fault or negligence of plaintiff while in the performance of his labors in the usual or proper manner, or while he was in the exercise of due care or caution.

VII.

Answering paragraph eight of said complaint, defendant admits that plaintiff has become totally blind in his right eye, and that the ball thereof has been removed, but denies that this was by reason of any injury received in the manner stated in said complaint. Defendant has no knowledge or information as to the other matters in said paragraph eight, and upon said ground denies said paragraph and each and every allegation therein contained, not herein specifically denied; denies that plaintiff has been damaged by this defendant in the sum of Fifteen Thousand ($15,000.00) Dollars, or in any sum.

And for further, separate and first affirmative defense to the said supposed cause of action set forth in said complaint, defendant alleges that any injury or damages sustained by the plaintiff, as set forth in the complaint, herein, was contributed to by the negligence, imprudence and want of care of the plaintiff himself.

And for further, separate and second affirmative defense to said supposed cause of action, defendant alleges that any injury or damage that plaintiff has received as aforesaid was caused by and resulted from the ordinary dangers, risks and hazards of the occupation in which the plaintiff was then en-

gaged, and which were necessarily incident to said occupation, and which were well known to plaintiff, and that the risk of said danger and hazards, and said damage and injuries, was known to and assumed by plaintiff at and prior to the time of said injuries.

WHEREFORE, having fully answered, plaintiff prays that it may be hence dismissed with judgment for its costs and disbursements herein.

F. V. BROWN
FREDERIC G. DORETY
Attorneys for Defendant.

(Filed Apr. 26, 1911.)

Reply

Now comes the plaintiff, and for his reply to the answer of the defendant, alleges, avers and states:

I.

Plaintiff denies each and every material allegation contained in paragraph one of defendant's first affirmative defense.

II.

Plaintiff denies each and every material allegation contained in paragraph one of defendant's second affirmative defense.

Wherefore, plaintiff demands judgment according to the prayer of his complaint.

HEBER McHUGH—JOHN T. CASEY,
Attorneys for plaintiff.

(Filed Dec. 30, 1910.)

Verdict

"We, the jury empanelled in the above entitled case, find for the defendant.

N. W. HAYNES, Foreman."

(Filed Apr. 27, 1911.)

Judgment

The above action having come on regularly for trial on the 26th day of April, 1911, the plaintiff appearing in person and by his attorneys, Messrs. Heber McHugh & John T. Casey, and the defendant appearing by F. G. Dorety, its attorney; the jury having been duly empanelled and sworn, and evidence having been introduced on behalf of the plaintiff and the defendant, and both sides having rested and submitted their respective cases to the jury, and arguments having been presented to the jury on behalf of both parties; the jury having been instructed by the court and having retired to deliberate upon its verdict, and the jury having returned into court and declared its verdict in favor of the defendant,

NOW, THEREFORE, it is ORDERED, ADJUDGED and DECREED that the plaintiff take nothing by this action, and that the defendant have judgment against plaintiff for dismissal of this action and for its costs and disbursements herein, and that said defendant may go hence without day.

DONE in open court this 3rd day of May A. D. 1911.

GEORGE DONWORTH,
Judge.

(Filed May 8, 1911.)

Motion for New Trial

Comes now the plaintiff and moves the court to vacate and set aside the verdict and judgment in the above cause, returned and entered herein on the 27th day of April, 1911, on the following grounds and for the following reasons:

1. Irregularity in the proceedings of the defendant and the jury by which the plaintiff was prevented from having a fair trial.
2. Misconduct of the defendant and the jury.
3. Newly discovered evidence, material to the plaintiff, which he could not have discovered with reasonable diligence and produced at the trial.
4. Inadequate damages given under the influence of prejudice.
5. That the verdict is against law.
6. Error in law occurring at the trial and excepted to at the time by the plaintiff.

This motion is made and based on the records and files herein and on the evidence taken and submitted at the trial herein and on affidavits to be hereafter served and filed.

HEBER HcHUGH, JOHN T. CASEY,
Plaintiff's Attorneys.

(Filed Apr. 29, 1911.)

Memorandum Decision and Order on Petition for New Trial

DONWORTH, District Judge:

This case was tried in the Circuit Court during the February (1911) term, verdict rendered for defendant and judgment entered thereon. The Circuit

Court having been abolished this decision and order will be entitled and filed in the District Court.

At the oral argument of this petition two grounds were urged by plaintiff's counsel, first; misconduct of defendant's attorney in his argument to the jury; second; error of the court in admitting certain testimony relating to the scope of the authority of the foreman, Pat Bolland. At the hearing of the petition I held the first ground to be untenable and took the petition under advisement as to the second ground.

On an examination of the record of the proceedings at the trial which has since been submitted to me, I can not find that the court made any error in respect to the admission of testimony. The question of the position and authority of Pat Bolland was not settled by the pleadings, but was open to proof at the trial. Both parties had a right to introduce evidence touching that point and the evidence that is now criticised was proper and pertinent to the issue. The argument now made by the plaintiff's counsel is erroneous in that it assumes that what was shown by the plaintiff's evidence became an incontrovertible fact in the case. No proof by one party, however strong, prevents the other party from introducing pertinent evidence touching a point which is left open by the pleadings.

The instructions to the jury are not now complained of nor was any exception taken to them by plaintiff's counsel at the trial. If, plaintiff's counsel had desired an instruction limiting the purpose

or effect of the testimony which is now criticised, or an instruction stating with more particularity the duties of the defendant as a master to furnish safe tools, under this or that hypothetical state of facts, disclosed by the evidence, such an instruction should have been requested, or the attention of the court called to the point in some manner at the time. I have read the instructions since this petition was argued and they seem to be full and clear.

Every litigant is entitled to have one full and fair trial of his case. There appears no reason to doubt that such a trial was had in the present instance. I see no ground for setting aside this verdict and I do not believe that a fairer trial could be had if the case were to be tried anew. The petition for a new trial is therefore denied.

An exception is allowed to plaintiff.

GEORGE DONWORTH, Judge.

Bill of Exception

The above case coming on for trial in the above entitled court, on April 26th, 1911, before Honorable George Donworth, presiding judge thereof, and a jury duly empannelled, the plaintiff appearing by Heber McHugh Esq., and John T. Casey, Esq., his attorneys, and the defendant appearing by F. V. Brown, Esq., and F. G. Dorety, Esq., its attorneys, the following proceedings were had, to wit:

After the opening statement by plaintiff's attorney, the following testimony was introduced in his behalf:

Testimony of JAMES BOLAND on his own behalf.

The Plaintiff being called and sworn as a witness, testified as follows:

DIRECT EXAMINATION.

My name is James Boland; I will be 21 on this July; I was working at Richmond Beach on the 7th day of August, 1909, as section laborer for the Great Northern Railway; I had worked there since March first; I had not before the 7th day of August, used a hammer against another steel tool on that section; I had not used a cold chisel during my work on this section, or at any time before the day of my injury; I did not know at the time of the injury that slivers were likely to fly from the head of the cold chisel when struck with a hammer; I had never seen any slivers fly from cold chisels or other tools when struck with hammers; at the time of the injury I did not know anything about the crystallization of steel or the tempering or hardness of steel; at the time of my injury I was engaged at boring holes in rails, Nick Brown was helping me; the foreman sent us to bore holes in a rail to put in a guard block; we put in the bolt through the hole in the guard rail and through the hole in the block, and it would not come out in the hole on the rail that we bored. We told the foreman that our bolt would not fit, and he said, "You will have to bore another hole right alongside of that hole," and when the hole was bored there was two corners between the holes and he said we would have to get the hammer and chisel and cut

(Testimony of James Boland.)

them out, and so I took the chisel and got down in the manner that he told me, and hit it about three times, and something flew and hit me in the eye, so I told Nick Brown, the fellow that was working with me, that I thought something hit me in the eye, and he looked at it, and he said he could not see anything in there; it was the right eye; I noticed something striking me in the eye just as I struck the blow on the chisel; Nick Brown said he could not see anything in the eye and so we looked at the hammer and the chisel, and right on the top of the chisel we saw a new speck where a piece of steel had flew out of there, and so we just thought the steel flew back and hit me in the eye and glanced off; we didn't find anything wrong with the hammer at all; so I then finished cutting out the chunk that was between the two holes and went home. (here witness was shown plaintiff's exhibit A for identification). That is the chisel I was using at the time I was injured; the head is in the same condition now that it was then; (here the witness shows the court and jury where the piece was that came off the top of the chisel at the time), it is along side the edge of the top.

Here exhibit A is offered and received in evidence. The foreman furnished the tools to work with on that section; the foreman hired and discharged the men there, during all the time that I had been there; there was nobody else there that furnished tools and hired and discharged men, except the foreman; there was no warning given me as to the condition of the

(Testimony of James Boland.)

tool. My eye was removed about six months later; I now wear a glass eye; the right eye; my left eye bothers me; my eyesight was good before I was injured.

CROSS EXAMINATION.

I don't know where the foreman got the chisel; I am sure I did not go over to the scow or engine and get it myself.

In my opinion it was never among the tools on my section, before the day of my injury. I knew it was not on the hand car and that the foreman did not go to the tool box to get it. If I had not bored a hole in the wrong place in the rail I would not have needed a chisel at all.

I never saw what you call a rail chisel, and don't know what it is. I do not know what kind of chisels they usually use for cutting rails. As to whether I would say, from my experience, that a rail chisel is not a necessary tool in a sectionman's equipment, I will say that I never saw one on a section and do not know whether there were any in the tool box or not. I never saw the chisel which I have offered in evidence before the day on which I was hurt.

A supply train came along while I was there. I think it is the train that brings the tools and takes them away to be repaired and brings new ones. I think the foreman obtains his tools from the supply car. I never saw them obtained in any other way.

REDIRECT EXAMINATION.

I didn't know the chisel was a defective chisel; I

(Testimony of James Boland.)

coundn't tell whether there was anything wrong with it or not.

NICK BROWN called and sworn as a witness, testified:

DIRECT EXAMINATION.

My name is Nick Brown; I live in Seattle; I was working with James Boland in 1909 when he was hurt. We had bored two holes with the drilling machine, and between the two holes the machine left two corners of steel. Jim Boland asked the boss how we were to cut off between the two holes; the boss is the foreman; the foreman came along and brought him the chisel, and he says, "Take that chisel and hammer and cut those two corners out"; then Jim did so, he sat down on the ground and he hit it a few times; then I seen him get up from the ground, and he held his eye and he said "Nick, something go in my eye—take a look at it." And so I looked at it and could not see anything. We looked at the hammer and chisel right away when Jim got hurt, and we saw a new place on the head of the chisel; (witness was here shown plaintiff's exhibit "A"). That is the chisel Jimmie used when he got hurt. I saw the new place right here (pointing), right in from the edge. We hadn't done any chiseling before that; I hadn't seen Jimmie do any.

I never used any chisels on the section, but I know that there were rail chisels with wooden handles in them in the tool box at the time of the accident. I

(Testimony of Nick Brown.)

do not know where the foreman got the chisel that we were using.

J. R. TURNER, the plaintiff's witness, being sworn, testified:

I live in Tacoma; am a manufacturer of steel tools; I have been engaged in handling, making and repairing of steel tools 40 years. The head of a chisel should be left untempered, so as to be of a soft nature, and not to chip off; being untempered it is tough, and when pounded on will receive the blow of the hammer and will naturally roll or burr over, not break away or fracture; the continual use of a cold chisel without dressing the head or annealing it, it naturally crystalizes; becomes brittle when crystalized; slivers are more apt to fly off when struck with a hammer; a cold chisel is a dangerous tool to use when it is crystalized and begins to fracture. When an experienced man sees that the head of a cold chisel is crystalized and dangerous the head should be repaired, the portions that show fracture should be cut away so as to leave solid head on the chisel; that is comparatively a simple matter. (Witness being shown plaintiff's exhibit "A," and testing it with a file). It is harder at that point than in the body of the tool, very similar to a tool that is tempered —it becomes hard so that the file does not cut it easily; an experienced man could easily tell by looking at the chisel that it is rather dangerous to work with, and should be dressed; if a cold chisel is either hard from tempering or brittle from crystalization,

scales are apt to form on the top and be thrown off when it is pounded on. I don't think an inexperienced man, one who had never worked with steel tools before, would know the danger of slivers or the likelihood of slivers flying off a cold chisel such as exhibit "A".

S. L. EATOUGH, the plaintiff's witness, being sworn, testified:

I am a tool dresser; have been engaged in that business about 21 years; during that time I have devoted my attention exclusively to repairing and sharpening tools and making them—working in steel altogether. (Witness was here shown plaintiff's exhibit "A"). The head of it has the appearance of being hard and crystalized, from the looks of it I should say that result was caused by being burned; the steel has been burned when it was made; it makes it brittle; and in that condition it would be a dangerous unsuitable tool; it could be repaired by cutting off the burned portion.

CROSS EXAMINATION.

This burning is the same as tempering, it is heated too hot and burned; it doesn't put the steel in the same condition as when it is tempered, it is spoiling the steel; it has the same effect as though it is crystalized so far as chipping is concerned, but it will do it quicker—it will break from the beginning, while the crystalization, it takes more time; when it is burned it will not burr over at all, it will break; plaintiff's exhibit "A" is not burred over on the edges

(Testimony of S. L. Eatough.)

at all—that is simply broke down—a cracking down.

JOHN MUNTZ, the plaintiff's witness, being sworn, testified:

I live in Tacoma; am a blacksmith; have followed that business about 30 years; I have made and repaired a great many steel tools—cold chisels; and understand how they should be made; the proper and customary way of making the head of a cold chisel is to leave it soft, so it won't fly; if it is tempered or has hardness, when you strike it, it would fly all over the place, and makes it dangerous; apt to hurt people; there is another way the head of a cold chisel becomes brittle and dangerous, besides tempering, it becomes crystalized by hammering a long time; a chisel in that shape is fully as dangerous as one which has been tempered; it is a very simple matter to repair it; by either cutting off the head or softening it; (witness examining plaintiff's exhibit "A") by the looks of it, I should say it is very hard and brittle, dangerous; by filing on it you can tell that it is hard; I could not tell whether that was produced by tempering or crystalization; cold chisels are made to be soft in the head that way, so that they broom over, so that they won't fly, they are dangerous when they fly; I think an experienced man could tell from an inspection of the head of exhibit "A" whether or not it was brittle and dangerous.

It was admitted that the guardian was duly appointed and qualified.

Plaintiff rests.

(Testimony of John Muntz.)

Defendant's challenge of sufficiency of the plaintiff's evidence and motion for judgment denied. Exception.

Defendant then introduced the following evidence:

CHARLES GABLE, the defendant's witness, being sworn, testified:

My name is Charles Gable. I am bookkeeper of the Electric Logging Company of Tacoma. During August 1909 I was chief clerk to the Superintendent of the Great Northern at Everett. About three or four days after the plaintiff's accident, he and his father called at my office, in response to instructions to bring in the chisel that had been chipped. The plaintiff brought a chisel with him that I now identify as defendant's Exhibit No. 3. It was handed to me by the plaintiff's father in the plaintiff's presence. The father told me that there was the chisel that caused the accident, and that the chip had broken off at the top. The plaintiff was then standing beside him.

JOHN CRAIG, the defendant's witness, being sworn, testified:

My name is John Craig; I have been section foreman for the Great Northern about 18 years;

Q. In your experience with the Great Northern have you ever known of their furnishing section men with chisels like plaintiff's exhibit "A" or defendant's exhibit "No. 3"?

Plaintiff by his counsel objected on the grounds

(Testimony of John Craig.)

that the evidence was incompetent, irrelevant, and immaterial;

The Court: Do you deny that the foreman furnished the tool in this case? That the foreman handed it to the plaintiff?

Mr. Dorety: Well we put them at issue on that; we put them to proof of it.

Objection overruled and exception noted for plaintiff.

A. No Sir; I never knew of that. I have ordered one like that, and they told me they did not furnish me with them (pointing to exhibit "A"), and this is not a chisel, Defendant's exhibit No. 3; this is a stone cutter's point, to cut holes in a rock to lift with the derrick.

The tools supplied to the section foreman came on a supply car; the foreman makes out a requisition on the first of the month for tools he wants, and on the last day of the month or thereabouts—on the 29th, may be to the second of the month ahead, he orders his tools and he gets them off the supply cars —returns his old tools and gets repaired ones in place of them.

Q. Does the section foreman have the authority to go and buy a tool and charge it to the company?

Plaintiff by his counsel objected on the grounds that the evidence was incompetent, irrelevant, and immaterial.

Objection overruled, and exception noted.

(Testimony of John Craig.)

A. No, Sir; I never had any instruction t ıy any tools, and never was allowed to.

Q. Does the section foreman of the Great Northern have authority to obtain tools in any way except from the supply train on requisition?

Plaintiff by his counsel objected on the grounds that the evidence was incompetent, irrelevant and immaterial; objection overruled and exception allowed and noted.

A. Not as I know of.

The plaintiff had worked for me before the accident and had used a hammer and tools. He was one of the best men I had with the hammer. I have examined the work that the plaintiff did on the date of his injury. If it had been properly done there would have been no need of using the chisel.

Defendant's exhibit 3 looks like a stone cutter's point, left by one of the stone masons who had been building the sea wall along there. I never saw a chisel like either of the ones produced in evidence used in track work.

Exhibit No. 2 is a track chisel which is furnished for cutting rails. It has a wooden handle eighteen inches long with which it is held. They are furnished to all sections. All Great Northern chisels are stamped with the letters "G. N." I noticed some rail chisels on Boland's section shortly before the accident. A rail chisel would have been the practical tool for the plaintiff to have used.

P. H. McFADDEN, the defendant's witness, being sworn, testified:

(Testimony of P. H. McFadden.)

My name is P. H. McFadden; I reside at Everett, Washington; am Division Roadmaster on the Great Northern, Cascade Division; that included the track upon which the plaintiff was working, Pat Boland's section; the section foreman and the section laborers work under the Road Department's direction; that is my department; I was in authority over all section foremen including Pat Boland.

In the month of August, 1909, tools for the use on the sections, and one in which Boland was, were furnished by monthly supply cars; the section foreman makes a requisition monthly, and that order is filled at the store department and sent out in the supply car once a month, and in most cases it is accompanied by the assistant roadmaster; the tools that are furnished in that way pass inspection at the shops and the store houses at each point they are furnished from, and also by the assistant roadmaster, and many times by myself if I go up with the car, and on the section; the regular shop inspections are made before they are shipped; the duty of the assistant roadmaster is to inspect the tools, and any defective tools shall be shipped in and new ones returned in their place; the rule is to make a trip of inspection and supply of that sort every month; that is done by the assistant roadmaster.

All the foregoing paragraph admitted over objection by plaintiff and exception allowed.

Q. Is there any authority in any of the section foremen, under rules of the company, or did Pat

(Testimony of P. H. McFadden.)

Boland have any authority in the month of August 1909, to procure tools in any other way?

Plaintiff by his counsel objected on the ground that the same is immaterial, irrelevant and incompetent. Objection overruled and exception allowed and noted.

A. None whatever. The job being done was putting in a guard rail.

Q. Would you consider that the necessity of that to be an emergency calling for the procuring of a tool in some way, if no suitable tool were on hand?

A. No. The matter could have remained in abeyance for several days or weeks and, I might say months, until the proper tool was supplied, if it was necessary to have that tool; the guard-rail would be held by guard-rail braces, which were supplied in that case; the guard-rail would perform its functions practically as well without the bolts, temporarily; one object of the bolt is to hold the foot-guard in place, our new standard guard-rail is supplied with a metal foot-guard; the foot-guard is a piece of steel at the end of the guard-rail to protect the brakemen or anyone walking on the track from getting his foot in there, and these bolts go through the guard-rail to hold that foot-guard to its place.

All the foregoing was over objection on ground of immateriality and irrelevancy, by plaintiff, and exception allowed.

Q. Will you state whether or not section foremen are required to make any regular inspections of the

(Testimony of P. H. McFadden.)

tools or any reports of the condition of the tools or anything of that sort?

Plaintiff objected because evidence was incompetent, irrelevant and immaterial, which objection the court overruled; exception noted.

A. They make requisitions for the tools, and in doing so they inspect them.

When the tools are supplied from the supply car inspection is made by the supplying party; the chisels marked plaintiff's exhibit "A" and defendant's exhibit No. 3, chisels of that kind are not furnished to section men of the Great Northern Railway Company; the chisel marked defendant's No. 2, is a track chisel; that is the regular chisel furnished to section men.

The foregoing admitted over objection and exception of plaintiff.

It is never the custom for the foreman to go and get a chisel from outside parties, even in an emergency. I never knew of its being done. In such a case he would make a special requisition to be delivered by passenger train shipment.

In doing the sort of work the plaintiff has testified to, a chip would be more likely to come from the rail than from the chisel. The object of using the chisel is to make chips fly from the rail. Such a chip would naturally fly toward the plaintiff.

JAMES BOLAND, plaintiff, in Rebuttal:

I was not with Pat Boland when he delivered exhibit 3, to Mr. Gable, at Everett; I never saw Mr. Gable before yesterday.

(Testimony of Patrick Boland.)

PATRICK BOLAND, for plaintiff, in rebuttal:

James Boland was not with me in the office at Everett when I gave exhibit 3 to Mr. McFadden; I did not give exhibit 3 to Mr. Gable; I did not tell Mr. Gable that the pice which hit plaintiff came from ex. 3.

PATRICK BOLAND, the defendant's witness, being sworn, testified:

My name is Patrick Boland; I am the stepfather of the plaintiff; was foreman of the section on which plaintiff was working in August, 1909, when his eye was hurt.

Q. Do you know where the chisel that James was using came from?

Plaintiff objected on the grounds that the evidence was incompetent, irrelevant and immaterial; exception noted.

A. Yes, sir.

Q. Where?

A. I gave it to him.

Q. Where did you get it?

Objected to by plaintiff on same grounds as above; objection overruled; exception noted.

A. I found it in the donkey engine.

Q. Where?

Same objection, same ruling; exception noted.

A. I found it on the scow.

Q. It was not a Great Northern chisel, was it?

Same objection; same ruling; exception noted.

A. No, I don't think it was.

(Testimony of Patrick Boland.)

RE-DIRECT EXAMINATION.

I had the regular standard rail chisel, a track chisel; I had track chisels like exhibit No. 2, I always carried them in my hand-car. (Admitted over objection and exception of plaintiff).

I am not working for the Great Northern now.

Both parties rest. The Court instructs the jury.

Instruction by the Court to the Jury

The Court:

Gentlemen of the jury, the incident which gave rise to this controversy took place in the month of August, something over a year and a half ago, at a point on the Great Northern Railway north of Seattle.

The plaintiff at that time was in the employ of the defendant and the case, therefore, involves the law relating to the mutual rights and obligations of master and servant, or as it is sometimes called, employer and employee.

The action involves the idea of negligence. It is predicated upon negligence. You have heard the definition of negligence so often that no doubt it is already well known to you, but to re-state it; negligence is the absence or the failure of the exercise of ordinary care. It consists in doing something which a person of ordinary care and prudence under the existing circumstances and conditions would not have done, or, on the other hand, omitting to do something which a person of ordinary care and prudence

under the existing circumstances would have done.

Now, while this is the legal definition of negligence, it is a question of fact as to whether negligence in fact existed or not, and you are to take this definition of negligence and apply it to the evidence in the case and say whether the defendant was negligent and whether the plaintiff was negligent, because either or both or neither may have been guilty of negligence, acording as you determine the facts to be from the evidence in the case.

Now, the plaintiff alleges that the cause of his injury was the failure of the defendant to perform its duty in reference to furnishing him a safe tool with which to work. Among other things in the complaint it is alleged that the defendant, disregarding its duty, did ta the time of committing the grievance hereinafter set forth, wrongfully and negligently furnish plaintiff with an unsafe and unsuitable cold chisel which was not of the proper softness, elasticity and temper to prevent the breaking, scaling, chipping and flying of the metal thereof when struck, but which cold chisel was of a hard, brittle metal and wholly unfit and unsafe and not in good condition to be used for the purpose for which it was intended and for which it was furnished to the plaintiff.

The allegations of negligence made by the plaintiff, only a portion of which I have read, are denied by the defendant, and the defendant affirmatively, in addition to denying the charge of negligence, sets up some affirmative defenses. The first one is that

the plaintiff himself in and about the occurrence producing the injury failed to exercise ordinary care on his part and was, therefore, guilty of contributory negligence.

The second defense is that the risks and dangers which brought about this injury were of the ordinary kind which usually—or which exist in this business independent of any question of negligence, and further that the defects which led up to the production of this injury, if it was produced, were apparent and were known to the plaintiff himself, so that he assumed those risks and dangers.

Those affirmative allegations of the defendant are denied by the plaintiff, so that it becomes important for you to know and bear in mind what obligations the law imposes upon a master in reference to the furnishing of proper tools to the servant.

The law does not make the master an insurer either of the lives or limbs of the employee—of the servant; the mere fact that the plaintiff while in the employ of the defendant received an injury of this character raises no presumption of negligence one way or the other. The question as to whether negligence existed is to be gathered by you—its existence or non-existence is to be gathered by you from all the evidence in the case.

Now, it is the duty of the master to provide the servant with reasonably safe tools and appliances for doing the work. "Reasonably safe" is the expression used in the law. It is not the duty of the master to furnish the most safe appliances or tools, the most

up-to-date, or one that is least likely to produce an injury. If the tool which is furnished is reasonably safe, then the duty of the master has been complied with.

In carrying out—in discharging this duty of providing a reasonably safe tool or tools it is the duty of the master to use ordinary care; that is to make such efforts; to take such precautions and do such things for the furnishing of a reasonably safe tool as a person of ordinary care and prudence under like circumstances and conditions would do. If the master uses ordinary care to that end, then he has discharged his full duty, and if an accident happens notwithstanding that exercise of due care, ordinary care, reasonable care by the master, then the master is not responsible, no matter how serious the injury may be.

It follows from this statement of the law that there may be accidents and injuries occurring within any employment which are not the result of negligence on the part of either party. If, for instance, in this case you should believe it to be the fact from all the evidence that the defendant exercised ordinary care to provide a reasonably safe tool or tools and that the plaintiff himself acted in an ordinarily prudent manner, yet, nevertheless, by reason of the flying off of a chip either from the chisel or from the rail, the plaintiff was injured, then that would be one of those accidents which inhere in every—in a business which may happen without the existence of negligence on the part of either party. Of course,

whether such a situation existed is entirely for you to determine from the evidence.

Now, this duty of the master, that I have spoken of, to exercise ordinary care to provide a reasonably safe tool or tools is said in law to be a duty that cannot be delegated. That is, that does not mean that the master may not, in fact, delegate it. He may do so; but whoever the master employs to perform that duty stands in the place of the master and his negligence is invariably taken to be the negligence of the master. It is delegable in that sense, if it is delegated nevertheless the delegate acts just the same as the master would and the master is chargeable for his neglect in any respect which amounts to a lack of ordinary care.

Now, there is a question of fact raised here as to whether the foreman, Pat Boland, was acting within the scope of his authority when he procured and furnished to the plaintiff the chisel with which this work was done.

Now, the authority of an employe or an agent may be shown in numerous ways. It is not necessary that the authority of an employee or an agent should be shown by direct evidence. It is not necessary to show the writing that gave him his authority nor bring some person who heard the directions given to him to authorize him to act. The authority of an agent, like most other matters, may be shown by circumstantial evidence; that is, it may be deduced from the facts and circumstances.

Now, whether the foreman was acting within the

scope of his authority in procuring this chisel and furnishing it, is a matter entirely for you to determine from all the evidence in the case.

You have the right to consider how he was acting and all the facts and circumstances surrounding the transaction concerning the usual performance of his duty and any other evidence in the case which throws any light, in your minds, as reasonable men, on the subject as to whether he was acting within the scope of his authority. If he was acting within the scope of his authority, then his acts are binding upon the defendant. If he was acting outside the scope of his authority then his acts are not binding upon the defendant.

Another question of fact in the case is as to what was the proximate cause of the injury to the plaintiff. The contention of the plaintiff is that during the use of this chisel, as I understand the contention of the plaintiff, that by reason of one of the strokes that the plaintiff made with the hammer against the chisel that a small particle of steel flew out from the chisel and entered his eye.

The defendant's contention is that that did not occur. It says if it did occur it did not come about from any negligence of the defendant and it further says that it did not happen at all. The defendant's contention is that a piece of steel from the rail was what flew back and made the trouble. Of course that is another question of fact for you to determine from the evidence in the case.

If Pat Boland was acting within the scope of his

authority, then if Boland, as representing the defendant, used ordinary care to provide a reasonably safe tool, that is, if the company and its representatives for which it was responsible, did everything that an ordinarily prudent person would have done under like circumstances and conditions, then the fact that a speck did fly off from this chisel, if it did, would not make the defendant liable, but if the defendant was negligent, if it or its employees authorized to act for it, as I have stated, did fail to exercise ordinary care to provide a reasonably safe tool, and as the result of that negligence on the part of the defendant, or its representatives, the injury happened, then the defendant would be liable, unless some of the affirmative defenses that I have mentioned are made out.

Now, in addition to the requirements that the defendant should exercise ordinary care, it is the duty of employees also to exercise ordinary care on their part. It was the duty of the plaintiff here in and about doing of this work, to exercise ordinary care to do whatever a reasonably prudent man would have done under like circumstances and conditions. If he failed to do this and was thereby guilty of negligence, and if that negligence was one of the contributing causes to the injury so that without that negligence on his part the accident would not have happened, then the plaintiff cannot recover, even though it should appear that the defendant also was negligent and that its negligence was also a contributing cause. Thus, if both parties were negligent and the

accident was caused by the joint result of the negligence of both parties, then the plaintiff cannot recover.

Now, in reference to the assumption of risk; there are two kinds of risks that should be considered; first, I will refer to what are called the ordinary risks. The ordinary risks in any business are those that exist in the business in spite of the exercise of ordinary care by the employer. Those are always assumed by the servant as a matter of course. If an injury and if an accident may take place in a line of business notwithstanding the exercise of ordinary care by the master, then that risk is one of the ordinary risks, and the employee assumes it.

Now, it is contended here by the defendant that even if this risk were not an ordinary risk, nevertheless it was assumed by the plaintiff. For the purpose of this case I may define an extraordinary risk as one that results from the negligence of the defendant by reason of its failure to exercise ordinary care to provide a reasonably safe tool.

Now, if defendant was negligent in failure to provide a reasonably safe chisel—furnished one that was defective, nevertheless the plaintiff by using that tool which was defective would assume the risk of so using it, provided the defect and the risk incident to the defect were known to him, or if they were so open and manifest that a person of his experience, his knowledge and his judgment would readily have observed them.

When you ome to the question of the assumption of an extraordinary risk you are to consider not only

the nature of the instrument but you are to consider the knowledge, the experience and the judgment of the person who is called upon to use it. The risk is not assumed—this extraordinary risk is not assumed if a person of his knowledge, experience and judgment would not have observed it, and if in fact it was not known to him. Otherwise the other rule would apply that I have stated.

Now, if you find for the plaintiff, you will come to the question of damages. The question of damages divides itself into two heads; those already incurred and those which will be incurred in the future. As to the past, you are to take into consideration any physical and and mental suffering that the plaintiff may have endured as the result of the injury, any discomfort and inconvenience resulting therefrom. He claims no loss of wages up to the present time, and as to the future he claims no wages —no compensation for loss of wages or earning capacity prior to his arriving at the age of twenty one years.

If the evidence makes it reasonably certain that the plaintiff will hereinafter suffer physical or mental pain as a result of this injury; discomfort or inconvenience, then your award of damages should make compensation for that, and to whatever extent it is reasonably certain that plaintiff's earning capacity in future will be impaired by reason of this injury you will make compensation by awarding at the present time such sum of money as will fairly

compensate him for that deprivation of his future earning capacity.

Now, in cases of this kind the law does not lay down any definite mathematical rule for estimating damages. They are left largely to the good sense and sound judgment of the jury. You are to bear in mind that the plaintiff, if he is entitled to recover, is entitled to recover just compensation, and his right of recovery is limited to just compensation, taking and bearing in mind the general rules that I have already stated.

You are the judges of all the questions of fact in the case, of the weight of the evidence and the credibility of the witnesses. You will pay no attention to any ruling that the court may have made in denying motions that have been made in this case. All that I have decided is that questions of fact are for you to determine and that you are responsible for a correct and righteous decision of those questions of fact.

In determining the credibility of the witnesses and the weight of the evidence you have the right to bear in mind not only the number of witnesses but the interest that they may have in the result of the case, the reasonableness of the story that they tell and any other circumstances and facts appearing in the evidence that, in the mind of a reasonable man, would have an effect in estimating the credibility due to any witness.

Now, the burden of proof is upon the plaintiff in this case to show to you by the fair preponderance of

the evidence, first, that the defendant was negligent and second, that that negligence was the proximate cause of his injury and, third, the extent of those injuries.

The burden is upon the defendant to prove that the plaintiff was guilty of contributory negligence or that he assumed any of the extraordinary risks such as I have already described.

By the greater weight of the evidence is meant the greater probability. If the evidence in favor of a certain proposition is equally balanced with the evidence against it, then the person holding the affirmative of that proposition, having the burden of proof, has not made out his case. But if the evidence preponderates in favor of the affirmative, that is, if the evidence in favor of the affirmative has a greater convincing force in your minds than the evidence in the negative, then the person holding the affirmative of that issue has made out his case—has established the point.

You have no right to find for the plaintiff for the reason that it is possible that he was injured by the negligence of the defendant.

In order for the plaintiff to make out a case it must appear by the weight of the evidence that the defendant was negligent and that its negligence was the proximate cause of the plaintiff's injury.

This case is submitted to you, gentlemen, to be decided without the effect of any sympathy or prejudice, as a cold question of fact to be determined solely from the evidence of the case.

You are to draw such conclusions, make such de-

ductions from the evidence in the case as you feel reasonable men should make from it.

In order to agree upon a verdict the concurrence of the entire twelve of your number is necessary.

The court will adjourn at half past four o'clock and if you have not agreed on a verdict at that time you may bring in a sealed verdict. That is, after agreeing on the verdict your foreman will sign it and it will be put in an envelope and sealed and retained by your foreman in his possession and you will then be in your seats tomorrow morning at 10 o'clock and the verdict will be opened and read. You may now retire.

MR. DORETY: Is it satisfactory to the court that any exceptions to the instructions may be taken later by stipulation of counsel?

THE COURT: If I have made any mistake I want an oportunity to correct it.

MR. DORETY: The defendant, may it please the Court, excepts to the instruction to the effect that there is a question of fact in the case as to whether the foreman was acting within the scope of his authority and that whether he was acting within the scope of his authority is for the jury to determine in this case.

THE COURT: Exception allowed. Have you any exceptions, Mr. McHugh?

MR. McHUGH: I think not.

Thereafter, on April 28, 1911, the jury returned a verdict in favor of the defendant.

Thereafter, and on January 8th, 1912, after argument on plaintiff's motion for a new trial, which motion was filed on April 30, 1911, and before the judgment was entered, the Court denied the motion and allowed plaintiff an exception.

Thereafter, on January 10th, 1912, James Boland having attained his majority in July, 1911, was substituted in person as plaintiff, for, and in place of the Guardian ad Litem.

Now, in the furtherance of justice and that right may be done, the plaintiff presents the foregoing as his Bill of Exceptions, and prays that the same may be settled and allowed, signed and certified by the Judge, as provided by law, and filed as a Bill of Exceptions.

HEBER McHUGH,
JOHN T. CASEY,
Attorneys for Plaintiff.

Order Settling Bill of Exceptions

Now on this 25th day of January, 1912, and less than 20 days after the disposition of the motion for a new trial in this cause, and within the time as extended by an order duly made on stipulation of the parties hereto for the settling and filing of the Bill of Exceptions in this cause, the above cause coming on for hearing on the application of the plaintiff to settle the Bill of Exceptions in said cause, plaintiff appearing by Heber McHugh, Esq., and defendant by F. G. Dorety, Esq., and it appearing to the Court that plaintiff's proposed Bill of Excep-

tions was duly served on the attorneys for the defendant within the time provided by law, and that no amendments have been suggested thereto, and that both parties consent to the signing and settling of the same, and that the time for settling the said Bill of Exceptions has not expired; and it further appearing to the Court that said Bill of Exceptions contains all the material facts occurring in the trial of said cause, together with the exceptions thereto, and the material matters and things occurring on the trial, except the exhibits introduced on the trial which are hereby made a part of said bill of exceptions and the clerk of this court is hereby ordered to attach the same thereto;

Thereupon, on motion of Heber McHugh, Esq., attorney for the plaintiff, it is hereby,

ORDERED, that said proposed Bill of Exceptions be and and the same is hereby settled as a true Bill of Exceptions in said cause, and that the same is hereby certified accordingly by the undersigned Judge of this court who presided at the trial of said cause, as a true, full and correct Bill of Exceptions, and the clerk of this court is hereby orderd to file the same as a record in said cause and transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit.

GEORGE DONWORTH,
Judge.

(Filed Jan. 25, 1912.)

Assignment of Errors

Comes now the plaintiff, James Boland, and files the following Assignments of Error upon which he will rely upon his prosecution of his Writ of Error in the above entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit, for the relief from the judgment rendered in said cause.

1.

The Honorable Circuit Court erred in admitting incompetent, irrelevant and immaterial evidence prejudicial to this plaintiff as follows:

The following evidence of Witness John Craig:

Q. In your experience with the Great Northern have you ever known of their furnishing section men with chisels like plaintiff's exhibit "A" or defendant's exhibit?

A. No sir; I never knew of that. I have ordered one like that, and they told me they did not furnish me with them (pointing to exhibit "A"), and this is not a chisel, Defendant's Exhibit No. 3; this is a stone cutter's point, to cut holes in a rock to lift with the derrick.

Q. Does the section foremen have the authority to go and buy a tool and charge it to the company?

A. No, sir; I never had any instruction to buy any tools, and never was allowed to.

Q. Does the section foremen of the Great Northern have authority to obtain tools in any way except from the supply train on requisition?

A. Not as I know of.

The following evidence of witness P. H. McFadden:

In the month of August, 1909, tools for the use on the sections, and one in which Boland was, were furnished by monthly supply cars; the section foreman makes a requisition monthly, and that order is filled at the store department and sent out in the supply car once a month, and in most cases it is accompanied by the assistant roadmaster; the tools that are furnished in that way pass inspection at the shops and the storehouses at each point they are furnished from, and also by the assistant roadmaster, and many times by myself if I go up with the car, and on the section; the regular shop inspections are made before they are shipped; the duty of the assistant roadmaster is to inspect the tools, and any defective tools shall be shipped in and new ones returned in their place; the rule is to make a trip of inspection and supply of that sort month; that is done by the assistant roadmaster.

Q. Is there any authority in any of the section foremen, under rules of the company, or did Pat Boland have any authority in the month of August 1909, to procure tools in any other way?

A. None whatever.

Q. Would you consider that the necessity of that to be an emergency calling for the procuring of a tool in some way, if no suitable tool were on hand?

A. No. The matter could have remained in abeyance for several days or weeks and, I might say months, until the proper tool was supplied, if it was

necessary to have that tool; the guard-rail would be held by guard-rail braces, which were supplied in that case; the guard-rail would perform its function practically as well without the bolts, temporarily; one object of the bolt is to hold the foot-guard in place, our new standard guard-rail is supplied with a metal foot-guard; the foot-guard is a piece of steel at the end of the guard-rail to protect the brakemen or anyone walking on the track from getting his foot in there, and these bolts go through the guard-rail to hold that foot-guard to its place.

Q. Will you state whether or not section foremen are required to make any regular inspections of the tools or any reports of the condition of the tools or anything of that sort?

A. They make requisitions for the tools, and in doing so they inspect them.

When the tools are supplied from the supply car inspection is made by the supplying party; the chisels marked plaintiff's exhibit "A" and defendant's exhibit No. 3, chisels of that kind are not furnished to section men of the Great Northern Railway Company; the chisel marked defendant's No. 2, is a track chisel; that is the regular chisel furnished to section men.

The following evidence of witness Patrick Boland:

Q. Do you know where the chisel that James ways carried them in my hand car.

A. Yes, sir.

Q. Where?

A. I gave it to him.

Q. Where did you get it?
A. I found it in the donkey engine.
Q. Where?
A. I found it on the scow.
Q. It was not a Great Northern chisel, was it?
A. No I do not think it was.

I had the regular standard rail chisel, a track chisel; I had track chisels like exhibit No. 2. I always carried them in my hand car

II.

The Honorable Circuit Court erred in overruling plaintiff's motion for a new trial.

WHEREFORE, plaintiff, plaintiff in error, prays that the judgment of the Honorable Circuit Court of the United States for the Western District of Washington, Western Division, be reversed and that directions be given that plaintiff may have a new trial of said cause and that full force and efficiency may inure to the plaintiff by reason of his prosecution of said cause.

HEBER McHUGH,
JOHN T. CASEY,
Attorneys for plaintiff.

(Filed Jun. 1, 1912.)

Order for Writ for Error

In the District Court for the Western District of Washington.

James Boland, Plaintiff,
vs.
Great Northern Railway Company, Defendant.
NI 1703-C.

On motion of John T. Casey, attorney for plaintiff, and on filing a petition for Writ of Error and assignment of errors

IT IS ORDERED that a writ of error be and the same is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein, and that the amount of the bond on said writ of error is hereby fixed at $250.

IN WITNESS WHEREOF, the above order is granted and allowed this 25 day of June, 1912.

FRANK H. RUDKIN,
Judge.

(Filed Jun. 25, 1912.)

Bond on Writ of Error

Whereas in the above entitled cause, plaintiff, James Boland, has applied to the Honorable judge of said Court for the allowance of a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit, and

Whereas said Court has fixed the security which plaintiff shall give in the sum of Two Hundred and Fifty Dollars,

NOW, THEREFORE, James Boland, as principal, and the other subscribers as sureties, acknowledge themselves held and firmly bound by these presents unto the defendant, Great Northern Railway Company, in the sum of Two Hundred and Fifty Dollars.

CONDITIONED that James Boland, appellant, shall prosecute his writ of error to effect, and if he fail to make his plea good, shall answer all costs.

The surety hereto further expressly covenants and agrees that in case of a breach of any condition of this bond, the above entitled Court may upon notice to the surety of not less than ten days, proceed summarily in said action to ascertain the amount which the said surety is bound to pay on account of the breach thereof and render judgment therefor against the surety and award execution therefor against the surety.

IN TESTIMONY WHEREOF witness the names of the parties hereto affixed by their duly authorized officers and attorneys this 25th day of June, 1912.

JAMES BOLAND,
By HEBER McHUGH, his atty.

(Seal of Surety Company.)

NATIONAL SURETY COMPANY,
By GEO. W. ALLEN,
Attorney-in-fact.

Approved July 1, 1912.

C. H. HANFORD,
Judge.

(Filed Jul. 1, 1912.)

Certificate

UNITED STATES OF AMERICA,
WESTERN
DISTRICT OF WASHINGTON.

I, A. W. ENGLE, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing and attached papers are a true and correct copy of the record and proceedings in the case of JAMES BOLAND, plaintiff, vs. GREAT NORTHERN RAILWAY COMPANY, a corporation, defendant, as the same remain on file and of record in my office.

I further certify that I hereto attach and herewith transmit the original Citation and original Writ of Error issued in this cause,

I further certify the cost of preparing and certifying said foregoing record to be the sum of $56.30, which sum has been paid to me by the attorneys for the plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court at the city of Tacoma, in said District, this 29th day of July, A. D. 1912.

A. W. ENGLE, Clerk.

(SEAL)

By James G. Funk
Deputy Clerk.